IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL N0.1306 OF 2003

Ayyub Jafarsab Sagari,]
Age: 40 yrs.Occ.Driver,]
R/o. Mhetre Wasti, Near]
Kumtha Naka, Solapur.]
(Presently in Solapur]
District Jail.)] ..APPELLANT.
(Orig.Accused)

Versus

State of Maharashtra] ..RESPONDENT.

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Mr.P.R. Arjunwadkar, Adv. for the Appellant.
Mrs.A.S.Pai, APP, for the State.

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CORAM : R.M.S.KHANDEPARKAR, &
SMT.V.K.TAHILRAMANI, JJ.

DATED : 19TH JULY, 2007.

JUDGMENT (PER SMT.V.K.TAHILRAMANI, J.) :

1. Through this Appeal, the appellant-original accused has challenged the judgment and order dated 10th October, 2003 passed by the learned 5th Additional Sessions Judge, Solapur in Sessions Case No.91 of 2003. By the said judgment and order, the learned Sessions Judge, convicted the appellant under Section 302 of IPC and sentenced him to suffer R.I. for life and fine of Rs.1000/- in default S.I. for two months.

2. The prosecution case, briefly stated, is as under :

. Niyamat Yakub Sayyed was married to one Yakub and she had children. However, Niyamat had an illicit affair going on with the appellant-Ayyub Jafarsab Sagari since about 15 years prior to the incident. This fact was known to the husband of Niyamat and her son. However since some time prior to the incident Niyamat refused to carry on the affair with appellant-Ayyub stating that now her children had grown up hence she did not wish to continue the affair. On account of this there were quarrels between Niyamat and the appellant. Niyamat used to work at brick kiln. On the day of the incident i.e. on 17.11.2002 at about 7:15 a.m. the appellant came to brick kiln. The appellant took Niyamat to her house and there again there was quarrel between Niyamat and the appellant. The appellant abused her and beat her. Thereafter he poured kerosene on her body and set her on fire. Thereafter Niyamat was brought to the hospital. PW-6 Dr.Kale examined Niyamat. Niyamat informed

Dr.Kale that she was mistress of Ayyub (appellant) since 15-20 years and that he was harassing her everyday and the appellant had poured kerosene on her body and set her on fire. This history was given to the doctor at about 10:10 a.m. . Thereafter, the police was informed. PW-5 PSI R.S.Bhosale came to the Civil Hospital. He recorded the statement (Exh.19) of Niyamat. The said statement was treated as First Information Report. Intimation was also given to PW-7 Special Executive Magistrate Mr.Jamdar. He came to the hospital and recorded the dying declaration (Exh.29) of Niyamat. Both the dying declarations were recorded after obtaining endorsement of doctor that Niyamat was conscious and in a fit state to give the statement. Niyamat died on 18.11.2002 on account of burn injuries which were to the extent of about 90%. After completion of investigation, the charge-sheet came to be filed. In due course the case came to be committed to the Court of Session.

3. The learned Sessions Judge framed the charge against the appellant under Section 302 of IPC. The appellant-accused pleaded not guilty to

the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced by the prosecution, the learned Sessions Judge convicted and sentenced the appellant, as stated in Para 1 above. Hence, this Appeal.

4. We have heard Mr.Arjunwadkar, the learned Advocate for the appellant-accused and Mrs.Pai, the learned A.P.P for the State. We have also perused the evidence on record as well as the judgment and order of the learned Sessions Judge. After giving our anxious consideration to the matter, we are of the opinion that this Appeal deserves to be dismissed.

5. The prosecution case is mainly dependent on the dying declarations made by deceased Niyamat. After Niyamat was admitted to hospital, PW-7 Mr.Jamdar, Special Executive Magistrate recorded the dying declaration (Exh.29) of Niyamat. In the said dying declaration (Exh.29), Niyamat has stated that she has illicit relations with the appellant. However, as her children had grown up,

she did not want to continue the said illicit relations. On account of this there were quarrels between her and the appellant. The appellant used to beat her. Niyamat has further stated that on the day of the incident, the appellant called Niyamat from her work and thereafter he beat her and poured kerosene on her body and set her on fire.

6. As far as dying declaration (Exh.29) is concerned, Mr.Arjunwadkar submitted that the said dying declaration was not written by the Special Execution Magistrate himself but it was written by some other person. He submitted that the person who scribed the document was not before the Court and hence no reliance can be placed on the said dying declaration because one does not know whether the dying declaration has been properly scribed or not. As far as this aspect is concerned, it is seen that PW-7 Mr.Jamdar, Special Executive Magistrate due to shaking of his hands had some difficulty in writing the dying declaration. Hence, Mr.Jamdar after obtaining endorsement of the doctor that the patient was conscious and was in a fit state to make a

statement, with the permission of the doctor he got the dying declaration recorded by one person who was accompanying another patient in the hospital. The said dying declaration has been made in presence of the Special Executive Magistrate. The answers have been given by the patient to the SEM Mr.Jamdar. Hence, even if the actual person who scribed the document was not examined, in our view, it would not affect the dying declaration in any manner.

7. As far as the dying declaration (Exh.29) is concerned, Mr.Arjunwadkar further contended that the said dying declaration did not bear the thumb impression of Niyamat. In relation to the thumb impression, PW-7 Mr.Jamdar has stated that as the patient had received burn injuries the first thumb impression was not visible one and as the first thumb impression was not visible, he obtained second thumb impression. We have carefully examined the said dying declaration (Exh.29) with the help of magnifying glass and we find that indeed there are two thumb impressions on the said dying declaration. Hence we find no merit in this contention.

8. After the dying declaration (Exh.29) was recorded by PW-7 SEM Mr.Jamdar at 10:15 a.m. thereafter PW-5 PSI Bhosale also recorded the dying declaration of Niyamat. The said dying declaration is at Exh.19 and it was recorded at 11:30 a.m.. Niyamat has stated the same facts which were stated by her in her earlier dying declaration (Exh.29).

9. As far as this dying declaration (Exh.19) is concerned, Mr.Arjunwadkar submitted that the thumb impression on the said dying declaration has not been identified by any person to be that of Niyamat. The evidence of PW-5 PSI Bhosale shows that the contents of the statement were read over to Niyamat, she admitted the contents of her statement and thereafter PW-5 Bhosale obtained her thumb impression on it and also signed the statement. PW-5 PSI Bhosale has categorically stated that the statement (Exh.19) now shown to him is the same. Thus, from the evidence of this witness it is seen that the thumb impression on Exh.19 is that of Niyamat. As far as this dying declaration (Exh.19) is concerned Mr.Arjunwadkar

submitted that this dying declaration cannot be relied upon because in the said dying declaration Niyamat's name is given as "Niyamat Yakub Sayyed" and not "Niyamat Ayyub Sagari". It is seen that the actual name of Niyamat was "Niyamat Yakub Sayyed" and not "Niyamat Ayyub Sagari". Ayyub Sagari is the name of the appellant, whereas Yakub Sayyed is the name of Niyamat's husband. From the evidence on record, especially Exh.19, it is seen that the appellant admitted Niyamat in the hospital. Hence, it is possible that the appellant gave her name as Niyamat Ayyub Sagari. Hence PW-5 PSI Bhosale on coming to know about the correct name of Niyamat, he has stated the name of Niyamat as "Niyamat Yakub Sayyed" in the statement recorded by him. As far as the name of Niyamat is concerned, in the facts of this case we do not find anything which would raise a cloud of doubt or suspicion in respect of dying declaration (Exh.19).

10. After Niyamat sustained burn injuries, she was taken to the hospital. Niyamat sustained burn injuries around 9:30 a.m.. PW-6 Dr.Kale examined Niyamat at about 10:10 a.m. and at that time

Niyamat gave history to him. Niyamat informed him that appellant-Ayyub has kept her as his mistress since about 20 years and he was harassing her and on the said day he poured kerosene on her body and set her on fire. The said history is recorded in the medical papers and it is at Exh.22. Thus, it is seen that immediately after Niyamat was admitted in the hospital, she informed the doctor that the appellant had set her on fire. Mr.Arjunwadkar has submitted that this case paper is a totally false and concocted document because the name of Niyamat is given as "Niyamat Ayyub Sagari" in the said dying declaration whereas the full name of Niyamat was "Niyamat Yakub Sayyed". As far as this aspect is concerned, it is seen that appellant took Niyamat to the hospital. The case papers of the patients who are in serious condition are not filled-in by the patients themselves but by the persons who accompany them, be it relative or a friend. In the present case, it appears that as Niyamat was mistress of the appellant since about 20 years, appellant gave the name of Niyamat as "Niyamat Ayyub Sagari". Thereafter, we find that in subsequent papers the name of Niyamat is shown as "Niyamat Yakub

Sayyed". In such circumstances, just because the name of Niyamat in the medical papers is shown as Niyamat Ayyub Sagari that would not affect the prosecution case.

11. As far as the dying declaration to PW-6 Dr.Kale is concerned, Mr.Arjunwadkar submitted that no specific question was put to the accused under Section 313 Cr.P.C. in relation to the dying declaration or the case history given to the doctor by Niyamat. We have perused the statement of the appellant under Section 313 Cr.P.C. and we find that he has been questioned about the history given by Niyamat to PW-6 Dr.Kale which Dr.Kale reduced into writing as per her say. The said question is at Question No.27. Thus, we do not find much substance in this submission.

12. It was further contended by Mr.Arjunwadkar that though the incident had taken place in a crowded locality and therefore many huts were adjoining the hut of deceased Niyamat, however, no independent witness or any neighbour of Niyamat was examined. As far as this aspect is concerned, it is seen that the incident had occurred inside

the house of Niyamat. At that time, no other person was present in the house except Niyamat and the appellant thus there was no occasion for any other person to actually witness the incident. In such case, non-examination of any neighbour or any other person would not affect the prosecution case.

13. Thereafter Mr.Arjunwadkar submitted that there was no intention on the part of the appellant to commit murder of Niyamat which is seen from the fact that the appellant himself had taken Niyamat to the hospital. He submitted that if there had been any intention to cause the murder of Niyamat, the appellant would not have taken Niyamat to hospital. As far as this aspect is concerned, the evidence on record clearly shows that the appellant poured kerosene on Niyamat and thereafter set her on fire. Niyamat has sustained about 90% burn injuries. Hence assuming that the appellant did not have the intention to cause death of Niyamat, the act was done with the intention of causing such bodily injury which he knew to be likely to cause death of Niyamat. Thus, we do not find much substance in this

submission.

14. Mr.Arjunwadkar further submitted that the dying declarations are concocted documents because Niyamat has sustained 93% burn injuries and in such case, she would not have been in a condition to give her dying declarations. As far as this aspect is concerned, it is seen that the first history is recorded by the doctor himself and the other two dying declarations bear the endorsement of the doctor that Niyamat was conscious and in a fit state to give her statements. Thus, we find this submission to be devoid of any merit.

15. Lastly, it was submitted by Mr.Arjunwadkar that the FIR was not sent within 24 hours to the Magistrate as required under Section 157 Cr.P.C. and as the FIR was not sent within 24 hours to the Magistrate, there was ample scope for falsely implicating the appellant. Mr.Arjunwadkar submitted that this is more so because the son of Niyamat did not like the relations of appellant with his mother i.e. Niyamat. Mr.Arjunwadkar submitted that on account of this, the son of Niyamat had a grudge against the appellant and

therefore he has falsely implicated the appellant. From the record, it does appear that the FIR was not sent within 24 hours to the Magistrate. However, it is pertinent to note that Niyamat sustained burn injuries at about 9:30 a.m. and at about 10:10 a.m. she was examined by PW-6 Dr.Kale to whom she has given the history that appellant poured kerosene on her and set her on fire. Thus, within almost half an hour of the incident Niyamat has told to an independent person i.e. the doctor that the appellant had set her on fire. In such case, even if the FIR was not sent to the Magistrate within 24 hours as required, no doubt can be raised regarding the false implication of the appellant in the FIR.

16. The evidence on record, specially the evidence of PW-5 PSI Bhosale, PW-6 Dr.Kale and PW-7 SEM Jamdar clearly implicate the appellant in a case under Section 302 of the IPC.

17. In this view of the matter, the appeal is dismissed. The conviction and sentence dated 10th October, 2003 recorded by the learned 5th Additional Sessions Judge, Solapur in Sessions

Case No.91 of 2003 is confirmed. The appellant is in jail. He shall serve out the sentence.

[R.M.S.KHANDEPARKAR,J.]

[SMT.V.K.TAHILRAMANI,J.]